Sears, Roebuck and Co. *and* Building Material Teamsters, Local 282, International Brotherhood of Teamsters, AFL–CIO.[1] Cases 2–CA–22797 and 2–CA–22951

September 30, 1991

DECISION AND ORDER

BY MEMBERS DEVANEY, OVIATT, AND RAUDABAUGH

On December 5, 1989, Administrative Law Judge Raymond P. Green issued the attached decision. The Respondent filed exceptions and a supporting brief, the General Counsel filed cross-exceptions and a supporting brief, and the General Counsel and Respondent each filed answering briefs.

The National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

The Board has considered the decision and the record in light of the exceptions and briefs and has decided to affirm the judge's rulings, findings,[2] and conclusions,[3] as modified, and to adopt the recommended Order.

The judge found that the Respondent violated Section 8(a)(1) when, during the preelection period, Regional Employee Relations Manager Leo McCormick told employees that the Union might send someone out to break their legs in order to collect dues. Citing *Future Ambulette*, 293 NLRB 884 (1989), the judge found that these remarks disparaged the Union and thereby interfered with employees' Section 7 rights. We find no such violation.

In *Future Ambulette*, the Board adopted without comment the judge's finding that an employer had unlawfully made disparaging remarks about a union business agent's honesty and competence. The finding of a violation was grounded, however, not only on the derogatory character of these remarks, but also on their context among other coercive statements, especially those tending to convey to employees the futility of their efforts to have the union as their collective-bargaining representative. Id. at 884.[4] Words of disparagement alone concerning a union or its officials are insufficient for finding a violation of Section 8(a)(1).[5] Nor does McCormick's statement constitute an unlawful threat, for it is well established that in order for a party to make a threat in violation of Section 8(a)(1) the action threatened must be within its power to carry out. See *Gauley Industries*, 260 NLRB 1273, 1279 (1982). Since McCormick was ascribing violent activity to the Union and not to the Respondent, his statement did not constitute a threat. Rather, his remarks, though flip and intemperate, are nonetheless only expressions of his personal opinion protected by the free speech provisions of Section 8(c) of the Act. See *Newsday, Inc.*, 274 NLRB 86, 95 (1985). We therefore find that his comments did not violate the Act and

[1] The name of the Charging Party has been changed to reflect the new official name of the International Union.

[2] The Respondent has excepted to some of the judge's credibility findings. The Board's established practice is not to overrule an administrative law judge's credibility resolutions unless the clear preponderance of all the relevant evidence convinces us that they are incorrect. *Standard Dry Wall Products*, 91 NLRB 544 (1950), enfd. 188 F.2d 362 (3d Cir. 1951). We have carefully examined the record and find no basis for reversing his findings.

In agreeing with the judge's finding that the Respondent violated Sec. 8(a)(1) by Auto Center Manager Joseph Strazzeri's instructing employees not to solicit the names, addresses, and telephone numbers of new coworkers, we find that Strazzeri orally promulgated an overly broad no-solicitation rule. See *Our Way*, 268 NLRB 394 (1983).

We adopt the judge's finding that the Respondent violated Sec. 8(a)(3) by discharging Bobbie Smith from her part-time position. Smith, who was a known union supporter, had a May 1988 request approved by Auto Center Manager Strazzeri for reduced hours in advance of obtaining full-time employment elsewhere. At the time her request was approved, the representation election had recently been held, but its outcome had not been determined, as an initial report on two determinative challenged ballots did not issue until July. Before that report, the Union held a one-vote lead. In the meantime, as the judge found, the Respondent decided to enforce personnel rules more strictly so as to establish precedent under a putative bargaining obligation for prospective negotiations, specifically, in Smith's case, rules governing absenteeism. Contrary to our dissenting colleague, there was no ''golden opportunity'' for the Respondent to pursue this course when Smith first requested to adjust her hours to accommodate outside full-time employment. According to Strazzeri, Sears had approved part-time arrangements in the past for ''a lot of [employees who] use Sears as a secondary job,'' and was in no position to deny the same treatment to Smith. Enforcement of the absenteeism policy, on the other hand, was veiled in the authority of a published set of rules—though rules that Strazzeri conceded had not been rigidly enforced before Smith's discharge. In any event, the judge found unpersuasive the Respondent's evidence that it would have discharged Smith for good cause even in the absence of her protected activity. See *Wright Line*, 251 NLRB 1083 (1980), enfd. 662 F.2d 899 (1st Cir. 1981), cert. denied 455 U.S. 989 (1980), approved in *NLRB v. Transportation Management Corp.*, 462 U.S. 393 (1983).

[3] The judge found, and we agree, that the Respondent's preelection announcement and implementation of an incentive program for its mechanics at its Fordham Road auto center violated Sec. 8(a)(1) of the Act. The General Counsel excepts to the judge's failure to find the same conduct also violated Sec. 8(a)(3). We find it unnecessary to pass on this exception because any additional finding in this regard would not affect the Order or notice.

[4] Precedent relied on by the judge in *Future Ambulette* for finding unlawful union disparagement is inapposite. The disparaging comments by the employers in both *Southland Knitwear*, 260 NLRB 642 (1982), and *Kawasaki Motors*, 257 NLRB 502 (1981), were in the nature of preelection misrepresentations, and both were decided before *Midland National Life Insurance Co.*, 263 NLRB 127 (1982), where the Board held that elections would no longer be set aside solely because of misleading campaign statements or misrepresentations of fact. Further, the defamatory remark found unlawful in *Kawasaki Motors* was an accusation of a bomb threat that the employer blamed for its own suspension of operations and linked to threats to close its plant in the future. 257 NLRB at 510–511.

[5] To the extent that *Future Ambulette* suggests that a violation of Sec. 8(a)(1) may be predicated on disparaging remarks alone, that decision is overruled.

shall dismiss the corresponding portion of the complaint.[6]

ORDER

The National Labor Relations Board adopts the recommended Order of the administrative law judge and orders that the Respondent, Sears, Roebuck and Co., New York, New York, its officers, agents, successors, and assigns, shall take the action set forth in the Order.

MEMBER RAUDABAUGH, dissenting in part.

I do not agree that the discharge of Smith violated Section 8(a)(3). In this regard, I note that in May 1988 Smith asked to work a reduced work schedule if she obtained work elsewhere. The Respondent, with knowledge of her union activities, approved the request. In my view, if the Respondent wished to rid itself of a union adherent, it had a golden opportunity to simply decline Smith's request. It is therefore doubtful, at best, that the Respondent subsequently seized upon her absences as a pretext to mask an unlawful motive of getting rid of a union adherent.

With respect to the assertion that the Respondent's discharge of Smith was related to an effort by the Respondent to enforce personnel rules more strictly because of prospective negotiations, I note that the General Counsel does not allege that any such effort was unlawful. Hence, a violation cannot be premised on the argument that the discharge was related to a tightening of the rules, for any such tightening of the rules was not unlawful. In addition, I note that the only evidence supporting the view that the Respondent tightened the rules because of prospective negotiations was the evidence concerning Smith's discharge. I would not rely on such circular reasoning to support a finding that Smith's discharge was unlawful.

[6] This dismissal requires no modification of the judge's recommended Order or notice.

Richard L. DeSteno, Esq., for the General Counsel.
Robert E. Wachs, Esq. (Wolf, Block, Schorr & Solis-Cohen), of Philadelphia, Pennsylvania, for the Respondent.

DECISION

STATEMENT OF THE CASE

RAYMOND P. GREEN, Administrative Law Judge. This case was tried in New York, New York, on July 18 to 21, 1989. The charge in Case 2–CA–22797 was filed on April 14, 1988, and the charge in Case 2–CA–22951 was filed on July 22, 1988.[1] The complaint in Case 2–CA–22951 was issued on December 29, 1988, and a consolidated complaint in the two cases was issued on February 28, 1989. As amended, the consolidated complaint alleged:

1. That Respondent in January 1988, by Luther Winkle, created the impression that its employees' union activities were under surveillance.

2. That Respondent in January 1988, by Claudio Ferdinand, interrogated employees about their union activities.

3. That Respondent in January 1988, by Joseph Strazzeri, threatened employees with discharge if they voted for the Union.

4. That Respondent in February 1988, by Strazzeri, threatened to terminate an employee incentive program; denied employees the right to wear union hats and badges; threatened the layoff of less senior employees; threatened employees with the loss of jobs and other unspecified benefits if they selected the Union or engaged in a strike; threatened to change an employee's work schedule; threatened to impose stricter disciplinary standards; interrogated employees regarding their union activities; created the impression that the Company was surveilling the employees' union activities; and promised an employee a promotion if he voted against the Union.

5. That Respondent in February 1988, by Sam Alexander, threatened employees with unspecified loss of benefits if the selected the Union.

6. That Respondent in February or March 1988, by Alexander, threatened employees with the loss of jobs if they engaged in a strike.

7. That Respondent in March 1988, by Alexander, told employees that it would be futile for them to select the Union because the Company would not negotiate in good faith.

8. That Respondent in June 1988, by Alexander, created the impression that the employees' union activities were being kept under surveillance.

9. That Respondent in or about February and March 1988 promised and granted improvements in the ventilation system, the construction of an employee lunchroom, improvements in bathrooms, and the institution of incentive pay and health insurance programs in order to induce them to vote against the Union.

10. That Respondent in February and early April 1988, by Leo McCormick, told employees that it would be futile for them to select the Union.

11. That Respondent in February 1988, by McCormick, threatened employees with the loss of benefits if they selected the Union.

12. That Respondent in March 1988, by McCormick, solicited grievances from employees.

13. That Respondent in April 1988, by McCormick, told employees that if they selected the Union and failed to pay dues the Union would injure them.

14. That Respondent on June 11, 1988, discharged Barbara Smith because of her union activities.[2]

On the entire record,[3] including my observation of the demeanor of the witnesses, and after considering the briefs filed, I make the following

[1] All dates are in 1988 unless otherwise indicated.

[2] At the hearing the General Counsel withdrew certain other allegations. He withdrew an allegation that the Respondent unlawfully discharged David Santiago and he withdrew an allegation that the Respondent unlawfully issued a written reprimand to Barbara Semedo.

[3] Certain errors in the transcript have been noted and corrected.

FINDINGS OF FACT

I. JURISDICTION

The Respondent admits and I find that it is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act and that the Union is a labor organization within the meaning of Section 2(5) of the Act.

II. ALLEGED UNFAIR LABOR PRACTICES

A. *Background*

The events in this case have their genesis in East Northport where this Union was certified by the Board on September 30, 1987, as the representative of Sears' auto center employees at that location. Negotiations at that store began in October 1987 and when the Union rejected the Company's final offer, it commenced a strike on January 21, 1988. In support of its economic demands, the Union, in addition to picketing the East Northport auto center, extended its picketing activity to nine other Sears locations in the New York region. Among the places picketed was the auto center located at Fordham Road in the Bronx, New York. Picketing at the Bronx store also began on January 21, 1988.[4]

While engaged in picketing at the Bronx store, the Union also engaged in organizational efforts and succeeded in obtaining authorization cards from some of the employees. Indeed, the Union obtained sufficient cards to enable it to file a petition for an election on January 29, 1988, in Case 2–RC–20451.

On March 1, 1988, a stipulation for certification upon consent agreement was executed and an election was conducted at the Bronx auto center on April 7, 1988. In that election, 30 votes were cast for the Union, 29 against, and 2 votes were challenged. Thereafter, a hearing was held to determine the eligibility of the challenged voters. After decisions by the hearing officer on July 8, 1988, and the Board on January 31, 1989, the challenged ballots were opened and this resulted in the Union not obtaining a majority of the votes. On February 14, 1989, the Board issued a certification of results.

On February 8, 1989, the Union filed a second petition for election in Case 2–RC–20612. Pursuant to a stipulation for certification executed on March 9, 1989, another election in the same unit was held on April 27. The Union also lost this election and a certification of results was issued on May 31, 1989.

B. *The Incentive Plan*

The General Counsel contends that the Company timed the implementation of an incentive program for its mechanics so as to influence the vote in the upcoming election scheduled to be held at the Fordham Road location. The Company asserts that the granting of this benefit (in effect a wage increase) was planned and decided upon prior to the union campaign which, as noted above, began on January 21. The plan was announced to the employees and implemented after the union campaign commenced.

An employer which grants wage increases or other benefits while an election petition is pending before the Board will be held to violate the Act unless it meets its burden of proof by showing that the increases either had been planned prior to the Union's advent on the scene or that they were part of some established past practice. *NLRB v. Exchange Parts Co.*, 375 U.S. 405 (1963); *Baltimore Catering Co.*, 148 NLRB 970 (1964). Further, where the announcement of a benefit is timed so as to influence the outcome of an election, the Board may find a violation of the Act even where the benefit had previously been planned. In *NLRB v. Pandel-Bradford*, 520 F.2d 275 (1st Cir. 1975), the court stated:

> The Board has long required employers to justify the timing of benefits conferred while an election is actually pending. Justifying the timing is different from merely justifying the benefits generally. Wage increases and associated benefits may be well warranted for business reasons; still the Board is under no duty to permit them to be husbanded until right before an election and sprung on the employees in a manner calculated to influence the employees' choice.

Frank DeSantis, the Respondent's personnel manager for the New York region testified that when he took over this position in October 1987 his predecessor told him that one matter that should be looked at was an incentive program for the auto centers. According to DeSantis, there was during 1987, an incentive program already established in the Boston, Dallas, and Atlanta regions. He states that he immediately began to study the possibility of such a plan for the New York area as a means of obtaining and retaining qualified people to work as mechanics.

According to DeSantis, there was a meeting of personnel managers in December 1987 where the subject of incentive plans was discussed. He states that thereafter, on January 5, 1988, he submitted a proposed incentive plan to Guy Miller, his superior in Chicago. He also testified that on January 21 he was given authorization to go ahead and fine tune the numbers of his January 5 proposal. DeSantis testified that he finally received the go ahead to implement his proposal (having refined the numbers), pursuant to a telephone conversation with Miller about 10 days later. (There is no written documentation showing such authorization or the date thereof.) Thereafter, on February 19, 1988, DeSantis held a meeting of the various store and auto center managers to explain the new incentive program which he determined would be implemented on February 28, 1988. The employees at most of the regional auto centers (including the Fordham Road auto center) were told of the new program on February 22. Curiously, DeSantis also testified that the same plan was introduced for employees in the region's main stores in April 1988 to become effective on May 27, 1988. (The employees of the main stores who were covered by this incentive plan did not vote in any election and the election for the Bronx auto center employees was held on April 7.)

While the evidence shows that thinking about and planning for an incentive program for New York region auto mechanics was undertaken before the Union began organizing at the Fordham Road auto center (on January 21), I do not believe that the Company would have implemented the program at this location or announced its implementation when it did, were it not for the election campaign.

[4] On February 11, a contract was reached between the Union and Sears concerning the employees at the East Northport auto center and the picketing ceased.

I initially note that DeSantis conceded in effect that one of his motivations in proposing the incentive plan was because of the union situation at the auto center in East Northport. Thus, it is evident from his own testimony that the plan was thought of, at least in part, as a prophylactic measure designed to ward off potential union organizational efforts at the other auto centers in New York.

Secondly, although DeSantis testified that his January 5 proposal was essentially adopted intact (with only the numbers refined), that proposal was intended to be experimental and to be implemented initially at only two or three of the regional auto centers. Moreover, the proposal intimates the connection with union activity. Thus, at the end of the proposal it states:

> Summary:
> Our proposal would be test the implementation in 2–3 stores as soon as approval is received, to generate interest in the program and to offset the impact of the signing of the E. Northport contract and then to roll out effective 6/1/88 to all other stores. (6/1 is the normal date for review and changes of existing wage schedule for Auto Center)

In view of the above, I conclude that by implementing and announcing the incentive program at the Fordham Road auto center prior to the election, the Employer violated Section 8(a)(1) of the Act.

C. *The Granting of Medical Benefits to Part-time Employees*

According to DeSantis, at a December 2 personnel manager's meeting, there was discussion of various changes in the Company's medical benefits. Included in the discussion was a proposal to extend medical benefits to part-time employees on a nationwide basis.

DeSantis testified that sometime in late January 1988, the Company's board of directors approved a change in the medical benefits so as to extend such benefits to those part-time employees who worked 1250 hours per year and who opted to participate in the plan. (This would cover employees who generally were scheduled to work 25 hours per week.) The effective date of this change was to be July 1, 1988, so that those part-time employees who had over 1250 hours by that date, or within the preceding calender year, would be eligible for insurance coverage.

The extension of medical insurance to part-time employees affected about 48,000 part-time employees on a nationwide basis. The number of part-time employees at the Bronx store who became eligible for the medical plan as a result of this change, numbered approximately 34. Needless to say, it would be hard to imagine that the Company in an effort to win an election in a unit of about 65 employees, changed its medical insurance program in a way that affected 48,000 other employees. Nevertheless, the General Counsel's theory is that the Company timed the announcement of this change in the Bronx auto center so as to influence the results of the election.

On February 9, 1988, headquarters sent a letter to all regional personnel managers announcing the extension of medical insurance to part-time employees. DeSantis in turn sent copies of the letter to all of the units in his region. According to the Company, DeSantis did this so that the store managers could communicate the changes with its employees. It asserts that similar announcements were made to employees throughout the country. According to the Company, the announcement was made in February, almost 6 months prior to the implementation date, so that those part-time employees who might want to participate in the plan would be able to make certain that they would have the 1250 hours required for eligibility.

A problem with the Respondent's assertions is that the letter referred to above was clearly meant for company management only. By its terms, it was not meant to be announced to employees and contrary to the Respondent's assertion, the Company presented no evidence that employees outside the New York region (or even apart from the Bronx store) were informed of this change as early as February 1988. Indeed, the telegram speaks of the need to develop specific details regarding the policy changes which would be communicated at some time prior to May 1, 1988. Also, at no point in the letter is there any mention of the need to notify employees quickly so that they could arrange their schedules to meet the 1250-hour eligibility requirement. In pertinent part the letter reads as follows:

> The purpose of this letter is to provide you advance information regarding a major benefit change that our our company has recently approved for implementation later this year. This change is a result of ongoing external and internal reviews of our benefit plans. . . . First, effective 7/1/88, all employees who work 1250 hours annually will be eligible to participate in our company's medical plan and the employee assistance plan.
> . . . .
> Third, in response to our company's need for a more flexible organization to meet our customers' shopping patterns, the 30 hour per week policy currently applied to associates working less than 40 hours a week will be increase to 35 hours per week.
> . . . .
> Representatives from field and headquarters are developing specific details of these policy changes with regard to operational procedures which will be communicated prior to May 1, 1988. You need to [be aware of] changes now, so you can use this information in addressing potential turnover situations. Please share this information with your management team so that they are participants in the commitment the company is making to enhance Sears' ability to attract and retain a quality work force dedicated to serving our customers.

In my opinion, the Company timed the announcement of this new benefit, at the Bronx auto center (a little more than 1 week after the Union filed its election petition), with the intention of inducing its employees to vote against the Union. As such I conclude that by timing the announcement in this fashion, and almost 6 months before the benefit's implementation date, the Company violated Section 8(a)(1) of the Act.

D. *The Lunchroom*

The General Counsel contends that after the Union began its organizing campaign, the Company began to make a se-

ries of shop improvements intended to influence the outcome of the vote. Among the improvements was the creation of a lunchroom allegedly made in February or March 1988.

The evidence in this case, including the testimony of the General Counsel's own witnesses, convinces me that a new lunchroom was constructed and essentially finished in late December 1987, well before the Union's appearance on the scene. Thus, whereas the employees has previously eaten in the men's locker room, the tire storage area was cleaned up, painted, and turned into a lunchroom. Also, the refrigerator and microwave were moved from the locker room to the new lunch area and this was accomplished before January 21, 1988. The only new items added to the lunchroom were a television which was put in sometime in March 1988 and an air conditioner that was installed in the latter part of April, after the election. Additionally, as a result of moving the lunch area, the Company sealed off an open door that separated the men's and women's locker rooms.

As it appears that the lunchroom improvements were planned and largely carried out prior to the union organizing campaign, I do not think that the General Counsel has made out his case in this respect.

E. *Other Improvements*

The evidence established that from time to time, employees have complained about broken windows, broken toilet paper dispensers, lost or broken tools, poor ventilation, and other problems. From what I could see, such complaints have gone on for a long time before the Union appeared, and will no doubt go on for a long time after the Union is gone.

The evidence also established that the Employer, prior to January 1988, had a committee of employees which met on a more or less regular basis to deal with morale and safety problems. Finally, the evidence established that the Employer has a regular maintenance staff which is responsible for day-to-day repairs on an ongoing and regular basis.

In my opinion the improvements testified to by the General Counsel's witnesses, and which he alleges were designed to influence voters, were nothing more than ordinary maintenance and repair. Thus, toilet paper dispensers were fixed when they were broken, tools were replaced when lost, and fans were fixed or installed when the old ones no longer worked. I do not view any of these ordinary repairs as sinister, as they represent the kind of normal maintenance that any business will require.

F. *McCormick's Group Meetings*

The record in this case establishes that immediately upon receipt of the the Union's petition for an election, the Company assigned Leo McCormick, its regional employee relations manager, to handle the election campaign. Consequently from January 29, McCormick and members of his staff were at the Bronx location on a regular basis advising local management, responding to employee questions, and holding meetings with employees. In addition to McCormick, the people who dealt with the election campaign on behalf of the Company were Luther Winkle, Renee Seratt, and Rudy Villareal. According to the Company's witnesses, the local management consisting of Sam Alexander and Joseph Strazzeri were essentially instructed to stay out of the way and to maintain normal business operations.

It is undisputed that McCormick had his first meeting with the auto center's employees on January 29, 1988, at the new lunchroom.

Two of the six witnesses called by the General Counsel testified to what McCormick allegedly said at the first meeting. According to Barbara Semedo, McCormick said that he was there to find out the employees' grievances and why they wanted a union. She testified that at this meeting employees aired some of their complaints (including complaints about benefits and the ventilation system), and that McCormick said that he would get back to them.

According to Albert Torres, McCormick said that he was there to find out what was going on in the auto center and what the employees' complaints were so that he could try to rectify them. Torres testified that a number of the employees stated their complaints ranging from water fountain leaks to tools to inadequate protective clothing. He states that McCormick said that he would get back to them after he spoke to Strazzeri, the auto center manager.

McCormick acknowledges meeting with the employees at this time and states that he merely told them that while the pickets were outside, the Union would be interested in getting them to sign cards and that if they did sign cards it meant that they would be giving up their rights of representation to the Union. He denies that he made any promises at this or any other time. He also denies that he told employees that he was there to find out what their grievances were or why employees would want a union.

According to McCormick, he held a series of employee meetings on March 30 and 31 and on April 3 and 4. These meetings related specifically to the election and Alexander and Strazzeri were not invited to attend. Various descriptions of these particular meetings are set forth below.

Torres testified that at one of the meetings he attended McCormick said something to the effect that if the Union got in, the employees wouldn't have the things they already had and would have to start from scratch when they got to the negotiating table. He also recalled that McCormick said that if employees didn't pay union dues, the Union would send people out and that they would ''come out and break our legs or something.'' On cross-examination, however, Torres agreed with the suggestion that McCormick said that during negotiations everything was negotiable and that the end result in terms of wages and benefits would be decided by negotiations.

Barbara Semedo recalled a meeting where McCormick told a group of employees that most of the part-time employees would be laid off or that they wouldn't get their jobs back if there was a strike. After being asked a leading question, she testified that McCormick said something to the effect that Sears would not negotiate that much about wages and benefits. On cross-examination, however, Semedo testified that McCormick said that wages and benefits were negotiable, but that the employees might not get what they asked for unless it was approved by the Company.

Joseph Varella testified that at a meeting in the main building McCormick said that a lot of what the Union was saying wasn't true and that we wouldn't get any more than what we already had if the Union came in. Varella also testified that McCormick stated that if employees didn't pay union dues, the Union ''would break your legs or something to that effect.''

Jennifer Warner recalled that at a meeting in the main store the Company passed out papers and business cards. She recalls that a man said that if the employees had any trouble, they could call one of the people whose names were on the cards.

McCormick testified that he explained to the employees how collective-bargaining agreements were made if a union was selected. He states that he told the employees that the Company would negotiate in good faith, but that although the Union would say anything to get them to sign cards, in reality everything was negotiable and there was no way that anyone could promise the outcome of negotiations. According to McCormick, he mentioned that in other union contracts the Company had refused to agree to dues-checkoff clauses and therefore employees were responsible for paying dues themselves. In this regard, McCormick said that one of the union people outside was called the enforcer and speculated that this person might be the one who would come knocking at employees' doors to collect their dues.

McCormick denied making any promises, denied stating that the Company would not negotiate, denied stating that bargaining would start from scratch, denied telling employees that if they engaged in a strike they would lose their jobs, and denied stating that the Union would break legs in order to collect dues.

McCormick testified that he did explain to the employees that there was the possibility of a strike if the Company did not agree to the Union's demands, but denies that he told that part-time employees would be laid off in the event of a strike. He also testified that he did refer to an existing program that the Company had whereby an employee with a grievance could take it to the supervisor and through a set of appeals up to regional manager or to a vice president. In this regard, he states he referred to a poster which described this program.

Based on the record as a whole including demeanor factors, I do not concluded that McCormick at the January 29 meeting unlawfully solicited grievances. In this regard, while I would credit the assertions that he asked employees what complaints they had, I do not believe that the record shows that this was accompanied by a contemporaneous express or implied promise to correct those grievances. At most, when the employees listed their complaints, McCormick said that he would check them out and get back to them. Further, this was not inconsistent with an existing practice at the shop of dealing with employee complaints through a safety committee and with a larger companywide program of dealing with employee grievances. *Mariposa Press*, 273 NLRB 528 (1984); *Ben Franklin Division*, 251 NLRB 1512, 1518 (1980); *Uarco Inc.*, 216 NLRB 1 (1974); *Reliance Electric Co.*, 191 NLRB 44, 46 (1971).

I also cannot conclude that McCormick at these meetings threatened to lay off strikers, or told employees that the Company would not bargain with the Union. It is evident to me that the testimony of the General Counsel's witnesses on these points was confused and that their memories were unreliable. Moreover, when asked on cross-examination to describe these meetings, their versions tended to become consistent with McCormick's. Therefore I conclude that at most McCormick informed the employees that the Company would bargain with the Union if it won the election, but that bargaining involved a negotiation process which was not predictable; that the Company might not agree to the Union's demands; and that if there was no agreement, the Union might engage in a strike. Such statements do not, in my opinion, constitute violations of the Act. *Plastronics, Inc.*, 233 NLRB 155 (1977).

I nevertheless shall credit the testimony of the witnesses who testified that McCormick said that the Union might send someone out to break legs in order to collect dues. For one thing, McCormick concedes that he told employees something very similar and the breaking legs statement is of a kind that is likely to be remembered in the form that it was made. Based thereon, I shall conclude that the Respondent, in this respect, unlawfully disparaged the Union and interfered with the employees Section 7 rights. See *Future Ambulette*, 293 NLRB 884, 887 (1989).

G. *Union Hats and Badges*

At some point in February or March 1988, the Union distributed hats having a union insignia to employees who wished to show their union support. Joseph Strazzeri, the auto center manager, concedes that he told employees that they could not wear these hats while at work. As to union buttons, the evidence is much less clearcut and I do not think that the General Counsel has made a sufficiently persuasive case that Strazzeri precluded or directed employees not to wear union buttons or other insignia.

Strazzeri testified that before January 1988 employees could and did wear all kinds of hats at work. He testified that during the early part of January, he received and distributed to employees a shipment of hats from Diehard, a company which manufactures the brand of batteries sold by Sears. Strazzeri also testified that at some point in the latter part of January he received and distributed a shipment of Sears hats to employees. According to Strazzeri, he made the decision to require the employees in the auto shop to wear either Sears or Diehard hats if they chose to wear a hat at all. He states that one of his reasons for making this decision was because a few (perhaps two or three) employees wore hats with emblems of Sears' competitors. Strazzeri testified that he made his decision to change the policy regarding hats in January 1988 when the Diehard hats arrived. He also states that this decision was approved by the unit manager, Sam Alexander. There is, however, no documentation such as memos, notes, or other writings to show when this decision was made and/or approved. In fact, the only evidence showing when it first was enforced was the evidence establishing that Strazzeri, in late February or March, told employees that they could not wear union hats while at work.

In the present case, the evidence establishes that the auto mechanics and indeed most of the employees in the auto center work in areas which are generally not visited by customers. That is, customers are usually kept in a separate area although there are occasions when customers will come in to the shop to inspect their vehicles. Nevertheless, it seems to me that contact between auto shop employees and customers is kept to a minimum and therefore a restriction on hats would have little impact on customer relations.

In my opinion, Strazzeri's testimony regarding when he made the decision to change the hat policy was not certain; was not supported by any other consistent evidence; and cut the line precariously close to when the Union appeared outside the shop. In fact, I believe that it was only after the

Union began organizing that Strazzeri decided to change the policy which had previously allowed employees to wear any kinds of hats while at work.

I conclude that the Respondent's prohibition on wearing union hats in the shop did not serve a legitimate business concern and that it was adapted with an antiunion purpose. Also as there was no showing that the union hats contained messages that were vulgar, obscene, or otherwise offensive, I shall conclude that the Company has violated Section 8(a)(1) of the Act by enacting the prohibition. *NLRB v. Malta Construction Co*., 806 F.2d 1009, (11th Cir. 1986); *Cannon Industries*, 291 NLRB 632, 637 (1988); *Page Avjet Corp*., 275 NLRB 773 (1985); *Albertson's Inc*., 272 NLRB 865 (1984); *Dixie Machine Rebuilders*, 248 NLRB 881, 882 (1980).

H. *The Discharge of Bobbie Smith*

Bobbie Smith was employed at the Company since April 1987 as a part-time mechanic/installer. Shortly after becoming employed by Sears, Smith also applied for a full-time job at the Manhattan State Psychiatric Center.

The evidence shows that Smith was a union supporter and that this was known to the Respondent. In fact it is admitted that on one occasion in March 1988 Strazzeri told her not to wear a union hat on the job.

According to Smith, she told Strazzeri in May 1988 that she was going to look for a full-time job elsewhere. She also testified that Strazzeri approved her request to work at Sears a couple of days a week if she got another job. Strazzeri, in his testimony essentially agreed with Smith on this point. (Note this took place after the election which had been held on April 7. However, the outcome of that election had not yet been determined and an initial report on challenged ballots did not issue until July 8, 1988, which was after Smith's discharge.)

Smith testified that on or about June 1 she received notification that she had gotten the job at the Manhattan State Psychiatric Center and was told to report for training on June 2. (She was scheduled to work on June 2.) According to Smith, she called Strazzeri on the morning of June 2, informed him that she had gotten another job, that she was in training and that she would let him know when her days off would be. She states that he simply said okay.

According to Smith, she called Sears again on June 6 and spoke to Melvin Rutledge, a supervisor in the auto center. She states that she told Rutledge that she still didn't know her days off and asked that he relay to Strazzeri the message that she would call as soon as she knew when her days off were going to be. Smith testified that she called a third time on June 10 and asked Supervisor Claudio Ferdinand if she was scheduled to work on June 11 and 12. According to Smith, Ferdinand said that she was scheduled to work on those days and that she should come in.

Smith testified that when she arrived at the Company on the morning of June 11, she was escorted by Strazzeri to the office of Sam Alexander and discharged. She states that Alexander told her that she was being discharged because she was absent from work for 3 consecutive days without calling. She states that she told him that she did call in and that she had an agreement with Strazzeri that when she got another job she could work part time at Sears. According to Smith, Alexander repeated that there was a standard policy regarding missing consecutive days and not calling.

The Company does indeed have a published set of rules which describe certain listed offenses which *may* lead to termination. One of these is ''Excessive absences or tardiness including absence from your job for two consecutive days without notifying your unit.''

The evidence shows that in general, the Company has utilized a progressive system of discipline in even egregious circumstances. Thus, Strazzeri testified that a discharge of an auto center employee ordinarily will be preceded by oral warnings and at least one written warning. Further, Strazzeri testified that insofar as an auto center employee, it would be the normal practice for him to make the discharge recommendation to Alexander. Finally, Strazzeri testified that in the past, the rules have been applied with a certain degree of flexibility and not with 100-percent rigidity.

As noted above, Strazzeri acknowledges that in April or May Smith told him of her intention to get a full-time job elsewhere. He also acknowledges that he agreed to allow her to work at Sears on a reduced schedule if she got another job. Indeed, he testified that this was not unusual and that there were other employees who did the same.

Strazzeri denies that Smith called him on June 2. However, he does state that Rutledge told him that Smith had called on that date and said that she would not be coming in because she had gotten a city or state job. Strazzeri also states that Rutledge told him that Smith said she would call later in the day regarding her schedule.

According to Strazzeri, on or about June 5 or 6 he reported to Alexander that Smith had missed more than 2 days without calling. Thus, despite receiving the June 2 message (on June 2) that Smith would not be in because she had gotten another job, Strazzeri instead of calling her at home to ascertain her situation, waited for her to miss several days and then reported to Alexander that she was ''missing in action.''

The testimony of the Company's witnesses shows that Smith, prior to June 2, had no prior warnings and that she was considered an adequate employee. Also, unlike other situations, Strazzeri testified that he never made a recommendation to discharge Smith and that this decision was made solely by Alexander. Additionally, there was evidence of other situations where employees who had gotten into fights in the shop or who were involved in loud arguments in the presence of customers were given warnings instead of being discharged.

Based on all the evidence, including company knowledge of Smith's support for the Union coupled with evidence of other unfair labor practices indicating antiunion animus, it is my opinion that the General Counsel has established, prima facie, that the Respondent discharged Smith in order to discourage union activity.[5] Accordingly, under *Wright Line*, 251

[5] Even assuming that the Company did not discharge Smith because of its belief that she was an active union supporter, I would still find that the discharge was intended to discourage union activity. In this respect, with the election results still uncertain and with the distinct possibility that the Union might be certified as the bargaining representative, it is my belief that the evidence would warrant the conclusion that the Company decided to more strictly enforce its rules than it otherwise would have, so as to establish a

Continued

NLRB 1083 (1980), enfd. 622 F.2d 899 (1st Cir. 1981), cert. denied 495 U.S. 989 (1982), the burden is shifted to the Respondent to establish that it would have discharged Smith for good cause despite her protected activity. Since I find Respondent's evidence in support of its defense to be unpersuasive, I shall conclude that the Company violated Section 8(a)(3) and (1) by discharging Bonnie Smith.

I. *Miscellaneous Allegations*

Jennifer Warner, a dispatcher at the auto center, testified that in April 1988 she had a private conversation with Strazzeri where he said that if the Union won he might not be able to schedule her work hours to accommodate her school schedule. She also testified that he said that he wouldn't be able to turn a blind eye to her latenesses if the Union came in. Additionally, Warner testified that Strazzeri said that he could see that she was prounion and asked her how she was going to vote.

In my opinion, Warner had great difficulty remembering the events that she was called upon to testify. On direct examination she had to be asked leading questions and shown a pretrial affidavit in order for her to answer the questions posed to her. Further, in certain respects her testimony was contradictory and inconsistent with her pretrial affidavit. Thus, she testified about being asked how she was going to vote after stating that Strazzeri did not ask her any questions. Also, in her pretrial affidavit, she stated: ''He then said he (Strazzeri) was going to tell me a few facts about what would happen if the union came in. He said the would schedule my working hours fairly.'' In short, I do not find that Warner's testimony is reliable enough to warrant holding the Respondent liable for the allegations which are based thereon.

Bonnie Bolton, who openly supported the Union, testified that on one occasion Strazzeri told her that the Union wasn't right for her and that the Company could offer her more than the Union could. She also stated that during this conversation he asked her what she thought about the Union. Bolton testified that on another occasion, Strazzeri told her that the Union couldn't offer her what the Company could. Finally, Bolton asserted that on one occasion she was having a conversation with Luther Winkle (one of the management representatives from Chicago), and that he said that he heard that she was going to vote for the Union.

I found the testimony of Bolton to be vague and imprecise. Also, it is clear that Bolton was not exactly a disinterested witness inasmuch as she had been discharged for cause on December 17, 1988. (The region did not pursue an unfair labor practice charge filed in relation to her discharge.) Therefore, as the above testimony was credibly denied by Winkle and Strazzeri, I shall recommend that the allegations based thereon be dismissed.

Albert Torres gave some confused testimony regarding a meeting held in the main store by Sam Alexander shortly before the election. After leading questions, Torres testified that Alexander said that if the Union comes in; ''there will be some layoffs for seniority. . . . He said seniority rules.'' After being shown his pretrial affidavit, he further testified that Alexander said that ''there would be layoffs if we went for the union.''

Torres also testified regarding a meeting with Strazzeri as follows:

> Q. Did Mr Strazzeri talk about anything besides the incentive plan ?
>
> A. No he didn't
>
> . . . .
>
> Judge: Did Mr. Strazzeri say anything anything else?
>
> Witness: No, he didn't
>
> . . . .
>
> Judge . . . Did Mr. Strazzeri say anything about benefits? . . . at any meeting in relationship to the Union.
>
> Witness: Well. Mostly what he said was that we would lose everything we got.
>
> Q. Did Mr. Strazzeri say anything else that you can recall about the union coming in?
>
> A. I don't know.
>
> Q. Do you remember him saying anything about if there was a strike—
>
> A. He says that he wasn't sure that we will guarantee our jobs back.

After additional leading questions and after being shown his affidavit, Torres then testified that Strazzeri also said that if the Union came in, people with less time would be laid off.

Torres claims that the meeting described above was attended by employees including Barbara Semedo and Bobbie Smith. Nevertheless, neither of these two persons testified to anything even remotely resembling what was described by Torres.

Based on the record herein I shall credit the testimony of Alexander and Strazzeri insofar as they denied the allegations related above by Torres. I shall therefore recommend the dismissal of the allegations based on that testimony.

Torres also testified that in January 1988 after he talked to a coworker about the Union he was asked by Claudio Ferdinand if he was a ''union man or a Sears man.'' While it is alleged that this constitutes unlawful interrogation, the evidence does not establish that Ferdinand was a supervisor at the time of this event. On the contrary, the evidence shows that it was not until months later that Ferdinand was promoted to a supervisory position. Therefore this allegation lacks merit.

Torres did, however, testify to another transaction which was corroborated by Joseph Varella and was essentially admitted by Strazzeri. In this regard, the testimony establishes that in October 1988 Torres and Varella at the beginning of the shift went around on various occasions and asked new employees for their names, addresses, and telephone numbers so that the Union could contact them. When Strazzeri found out about this he told both that they could no longer engage in such activity while they were on the job. Such a restriction, which was imposed solely for union activity, is in my opinion violative of Section 8(a)(1) of the Act. *Arthur Young & Co.*, 291 NLRB 39, 44 (1988); *T & H Investments*, 291 NLRB 409, 414 (1988); *Our Way*, 268 NLRB 394 (1983).

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precedent if and when negotiations occurred. That is, I conclude that were it not for the fact that the election results were still pending, I think that the Company, based on its past practice, would have given Smith a warning at most.

CONCLUSIONS OF LAW

1. By discharging Bobbie Smith because she joined and/or supported Building Material Teamsters, Local 282, International Brotherhood of Teamsters, AFL–CIO, the Respondent has violated Section 8(a)(1) and (3) of the Act.

2. By implementing and announcing an incentive program at the Bronx auto center for the purpose of inducing employees to vote against the Union, the Respondent has violated Section 8(a)(1) of the Act.

3. By prematurely announcing the extension of medical benefits to part-time employees at the Bronx auto center, for the purpose of inducing employees to vote against the Union, the Respondent has violated Section 8(a)(1) of the Act.

4. By prohibiting employees at the Bronx auto center from wearing union hats while at work, the Respondent has violated Section 8(a)(1) of the Act.

5. By prohibiting employees from soliciting support for the Union at the Bronx auto center, the Respondent has violated Section 8(a)(1) of the Act.

6. The aforesaid unfair labor practices affect commerce within the meaning of Section 2(2), (6), and (7) of the Act.

7. Except to the extent found above, the Respondent has not violated the Act in any other manner as alleged in the amended complaint.

REMEDY

Having found that the Respondent has engaged in certain unfair labor practices, I find that it must be ordered to cease and desist and to take certain affirmative action designed to effectuate the policies of the Act.

The Respondent having discriminatorily discharged an employee, it must offer her reinstatement[6] and make her whole for any loss of earnings and other benefits, computed on a quarterly basis from date of discharge to date of proper offer of reinstatement, less any net interim earnings, as prescribed in *F. W. Woolworth Co.*, 90 NLRB 289 (1950), plus interest as computed in *New Horizons for the Retarded*, 283 NLRB 1173 (1987).

On these findings of fact and conclusions of law and on the entire record, I issue the following recommended[7]

ORDER

The Respondent, Sears, Roebuck and Co., New York, New York, its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Discharging or otherwise discriminating against any employee for supporting unionization.

(b) Implementing and announcing wage increases for the purpose of inducing employees to vote against Building Material Teamsters, Local 282, International Brotherhood of Teamsters, AFL–CIO or any other labor organization.

(c) Prematurely announcing the extension of medical benefits to part-time employees for the purpose of inducing employees to vote against the Union.

(d) Prohibiting employees from wearing union hats while at work.

(e) Prohibiting employees while at work from soliciting support for the Union.

(f) In any like or related manner interfering with, restraining, or coercing employees in the exercise of the rights guaranteed them by Section 7 of the Act.

2. Take the following affirmative action necessary to effectuate the policies of the Act.

(a) Offer Bobbie Smith immediate and full reinstatement to her former job on a part-time basis or, if that job no longer exists, to a substantially equivalent position, without prejudice to her seniority or any other rights or privileges previously enjoyed, and make her whole for any loss of earnings and other benefits suffered as a result of the discrimination against her in the manner set forth in the remedy section of the decision.

(b) Remove from its files any reference to the unlawful discharge and notify the Bobbie Smith in writing that this has been done and that the discharge will not be used against her in any way.

(c) Preserve and, on request, make available to the Board or its agents for examination and copying, all payroll records, social security payment records, timecards, personnel records and reports, and all other records necessary to analyze the amount of backpay due under the terms of this Order.

(d) Post at its facility in the Bronx, New York, copies of the attached notice marked ''Appendix.''[8] Copies of the notice, on forms provided by the Regional Director for Region 2 after being signed by the Respondent's authorized representative, shall be posted by the Respondent immediately upon receipt and maintained for 60 consecutive days in conspicuous places including all places where notices to employees are customarily posted. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material.

(e) Notify the Regional Director in writing within 20 days from the date of this Order what steps the Respondent has taken to comply.

[6] As of June 11, 1988, when Smith was discharged, she clearly was seeking to work only 2 days per week. Accordingly, it would not be appropriate to require the Respondent to offer her employment for more than 2 days per week. Nor do I think it would be appropriate to compute her backpay on the assumption that she would have worked more than 2 days per week if she had continued to be employed.

[7] If no exceptions are filed as provided by Sec. 102.46 of the Board's Rules and Regulations, the findings, conclusions, and recommended Order shall, as provided in Sec. 102.48 of the Rules, be adopted by the Board and all objections to them shall be deemed waived for all purposes.

[8] If this Order is enforced by a judgment of a United States court of appeals, the words in the notice reading ''Posted by Order of the National Labor Relations Board'' shall read ''Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board.''

APPENDIX

NOTICE TO EMPLOYEES
POSTED BY ORDER OF THE
NATIONAL LABOR RELATIONS BOARD
An Agency of the United States Government

The National Labor Relations Board has found that we violated the National Labor Relations Act and has ordered us to post and abide by this notice.

Section 7 of the Act gives employees these rights.

To organize
To form, join, or assist any union
To bargain collectively through representatives of their own choice
To act together for other mutual aid or protection
To choose not to engage in any of these protected concerted activities.

WE WILL NOT discharge or otherwise discriminate against any of you for supporting any union.

WE WILL NOT implement and announce wage increases for the purpose of inducing our employees to vote against Building Material Teamsters, Local 282, International Brotherhood of Teamsters, AFL–CIO or any other labor organization.

WE WILL NOT prematurely announce the extension of medical benefits to part-time employees for the purpose of inducing our employees to vote against the Union.

WE WILL NOT prohibit our employees from wearing union hats while at work.

WE WILL NOT prohibit our employees while at work from soliciting support for the Union.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce our employees in the exercise of the rights guaranteed them by Section 7 of the Act.

WE WILL offer Bobbie Smith immediate and full reinstatement to her former job on a part-time basis or, if that job no longer exists, to a substantially equivalent position, without prejudice to her seniority or any other rights or privileges previously enjoyed, and make her whole for any loss of earnings and other benefits suffered as a result of the discrimination against her in the manner set forth in the remedy section of the decision.

WE WILL remove from our files any reference to the unlawful discharge and notify Bobbie Smith in writing that this has been done and that the discharge will not be used against her in any way.

SEARS, ROEBUCK and CO.